American Bar Association Section of Litigation
Civil Discovery Standards
(August 1999)

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

ii. Unless otherwise stated in a request, a request for "documents" should be construed as also asking for information contained or stored in an electronic medium or format.

iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

b. Discovery of Electronic Information.

i. A party may ask for the production of electronic information in hard copy, in electronic form or in both forms. A party may also ask for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (a) whether and when electronic mail was sent or opened by its recipient(s) or *(b)* whether and when information was created and/or edited. A party also may request the software necessary to retrieve, read or interpret electronic information.

ii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, the court should consider such factors as (a) the burden and expense of the discovery; *(b)* the need for the discovery; *(c)* the complexity of the case; *(d)* the need to protect the attorney-client or attorney work product privilege; *(e)* whether the information or the software needed to access it is proprietary or constitutes confidential business information; *(t)* the breadth of the

discovery request; and (g) the resources of each party. In complex cases and/or ones involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues

iii. The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

iv. Where the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:

(a) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;

(b) the relative expense and burden on each side of producing it;

(c) the relative benefit to the parties of producing it; and

(d) whether the responding party has any special or customized system for storing or retrieving the information.

v. The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.

Comment

Subsection (a). Fed. R. Civ. P. 34(a) and various state rules, e.g., Va. Sup. Ct. R. 4:9(a), provide that the term "documents" includes "data compilations from which information can be obtained [or] translated, if necessary, by the respondent through detection devices into reasonably usable form." See also Fed. R. Civ. P. 34(a), 1970 Advisory Committee Note. The 1993 amendment to Fed. R. Civ. P. 26 also makes "data compilations" subject to mandatory disclosure. Tex. R. Civ. P. 196.4 also calls for the production of data or information in electronic or magnetic form, but only if it is specifically requested.

This Standard makes it clear that (a) information contained or stored in an electronic medium or format should be produced pursuant to a "document" request and (b) a party has the same duty when it is aware of potential or pending litigation to take reasonable

steps to preserve potentially relevant electronic information as it does to preserve "hard" copies of documents.

Subsection (a)(iii). Attempting to retrieve previously deleted electronic information can be time-consuming and costly. Just as a party ordinarily has no duty to create documents, or to re-create or retrieve previously discarded ones, to respond to a document request, it should not have to go to the time and expense to resurrect or restore electronic information that was deleted in the ordinary course of business. E.g., Tex. R. Civ. P. 196.4 (duty to produce applies only to electronic data that is "reasonably available to the responding party in its ordinary course of business"); Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996) (plaintiff may search defendant's computer for purged information only if the plaintiff shows the likelihood of retrieving it and there is no less intrusive way to obtain it; any search must have defined parameters of time and scope and ensure that the defendant's information remains confidential and its computer and databases are not harmed).

Subsection (b). The Standard contemplates that whether and, if so, how much electronic information is subject to discovery, along with the allocation of the cost of producing it, depends on the factors specific to each case. See, e.g., Tex. R. Civ. P. 196.4 (if objected to, no out-of-the-ordinary efforts to retrieve electronic information are required unless the court orders them; if it does so, the requesting party must pay for them); In re Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, MDL 997, 1995 U.S. Dist. LEXIS 8281 (N.D. III. June 13, 1995) (weighing whether to compel a company to retrieve and produce electronic mail messages at its expense); Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ 2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (neither the fact that material was available in hard copy nor the need for the responding party to create the computerized data necessarily precluded production of the information in computerized form); PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 257 (D.D.C. 1991) (requiring production of computerized records where no program existed to obtain the requested information because the response would require "little effort" and "modest additional expenditures"); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (requiring production of information on computer-readable magnetic tape in addition to hard copy; the discovering parties were required to pay for making the tapes); In re Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 634, 635-36 (E.D. Mich. 1989) (party required to produce simulation data on computer-readable tape in addition to hard copy); Armstrong v. Executive Office of the President, I F.3d 1274, 1280 (D.C. Cir. 1993) (printouts were not acceptable substitute because they did not reveal various information such as directories, distribution lists, acknowledgments of receipts and similar materials); see also Federal Judicial Center, Manual for Complex Litigation, 3d § 21.446 (1995).

An issue arises when responsive information required to be produced is part of a much larger database and no software exists to retrieve only the responsive information. A large database, e.g., the transaction history for every customer of a business, should not be made available as if it was a single "document." The parties should confer in this

situation and attempt to agree on what will be produced, the format and who will bear the cost of extracting the information.